

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the matter of the application of

VINCENT A. CATOGGIO

for an order of mandamus or an injunction

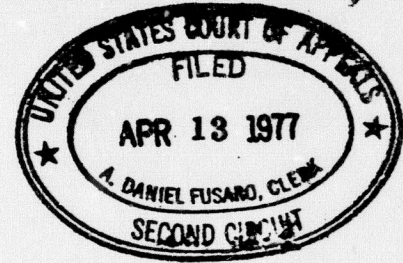
against

THE HONORABLE JACOB MISHLER, CHIEF JUDGE,
JACK B. WEINSTEIN, MARK A. COSTANTINO,
EDWARD R. NEAHER, THOMAS C. PLATT, HENRY
BRAMWELL AND GEORGE C. PRATT, District
Judges of the United States District Court
for the Eastern District of New York

Respondents

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PETITIONER'S BRIEF



77-3011

B

VINCENT A. CATOGGIO
United States Magistrate
Eastern District of New York

PETITIONER'S BRIEF

INDEX

	<u>PAGE</u>
Authorities Cited.....	A
Issues presented	B
Facts	1
Point I - RESPONDENTS' ACTION FROM INCEPTION VIOLATED EXISTING LAW. IT WAS ARBITRARY AND CAPRICIOUS	2
Point II - RESPONDENTS MISCONSTRUE THE FEDERAL MAGISTRATES ACT ..	4
Point III - 631(d) AND THE METHOD IN WHICH IT IS EMPLOYED IN THIS CASE VIOLATE THE FIFTH AMENDMENT	10
Point IV - THE INJUSTICE TO PETITIONER	14
Point V - PETITIONER DID NOT WAIVE OR GIVE UP ANY RIGHTS	16
Point VI - MANDAMUS AND PROHIBITION ARE APPROPRIATE REMEDIES	18
Reply to respondents brief	19
Conclusion	22

AUTHORITIES CITED

	<u>PAGE</u>
Rule 81(b) F. R. C. P.	1
65 F. R. C. P.	1
Rule 21 Federal Rules Appellate Procedure.....	1
5 U. S. C. 8335.....	2, 4, 16
28 U. S. C. 634(c).....	4
28 U. S. C. 631(d).....	5
Senate Report 371 - 90th Congress.....	6, 9
28 U. S. C. 632	14
28 U. S. C. 631(h).....	8, 22
<u>Albert v. Harrison</u> , 68 F. Supp. 732.....	17
<u>Baldwin v. Liverpool</u> , 74 N. Y. 125.....	17
<u>Bolling v. Sharpe</u> , 347 U. S. 497.....	10
<u>Connelly v. General Construction Co.</u> , 269 U. S. 385.....	12
<u>Crampt v. Board of Public Instruction</u> , 368 U. S. 279.....	11
<u>Earnest v. Willingham</u> , 406 F. 2d 681.....	13
<u>First National City Bank of Cincinnati v. Pepper</u> , 454 F. 2d 626..	17
<u>Giaccio v. Pennsylvania</u> , 382 U. S. 399.....	13
<u>Harmony v. Bingham</u> , 12 N. Y. 99.....	17
<u>Johnson v. Mishler</u> , 526 F. 2d 364.....	19
<u>LaBuy v. Howes Leather Co.</u> , 352 U. S. 249.....	19
<u>Loneragan v Buford</u> , 148 U. S. 581.....	17
<u>McPherson v. Cox</u> , 86 N. Y. 472.....	17
<u>Radick v. Hutchins</u> , 95 U. S. 210.....	17
<u>Radio Position Finding Corp. v. Bendix</u> , 205 F. Supp. 850.....	13
<u>Saxton v. Barry</u> , 233 F. 2d 220.....	12

PAGE

<u>United Public Works v. Mitchell</u> , 330 U. S. 75.....	13
<u>U. S. v. Dooling</u> , 406 F. 2d 192.....	19
<u>U. S. v. Weinstein</u> , 452 F. 2d 704.....	19
<u>Wallace v. Currin</u> , 92 F. 2d 856.....	13

ISSUES PRESENTED

1. Is petitioner's termination for age alone, before completion of his eight year term permissible under 5 U. S. C. 8335.
28 U. S. C. 631(e) and (h)?
2. As to 28 U. S. C. 631(d)
 - a- Is it viable under the Fifth Amendment, other laws and facts of this case?
 - b- When petitioner was appointed by unanimous vote for eight years spanning his 70th birthday was this not the unanimous vote required to continue petitioner's service.
 - c- Is not any extension of petitioner's service an extension for balance of petitioner's term?
3. Did petitioner consent to termination of his term before its expiration and if he did was not such consent obtained through coercion and duress making it unenforceable?

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PETITIONER'S BRIEF

F A C T S

Petitioner is a full time United States Magistrate in the United States District Court for the Eastern District of New York, appointed pursuant to 28 U. S. C. 631 et seq., for a term of eight years commencing January 1, 1971 by the unanimous order of the then eight active Judges of the said court dated December 28, 1970. (Exhibit A). Petitioner prays herein for an order of mandamus pursuant to Rule 81(b) F. R. C. P. and Rule 21 of the Federal Rules of Appellate Procedure and/or an injunction pursuant to Rule 65 F. R. C. P. restraining the respondents, the active Judges in the Eastern District of New York, from terminating his services before December 31, 1978.

As will be related in greater detail herein the said judges are attempting to terminate Petitioner's services as of June 13, 1977, his seventy second birthday. This followed the adoption of a resolution by the active judges on June 16, 1975 that upon reaching age 70 all employees of the court must retire. (Exhibit B). By order dated June 16, 1975 Petitioner's services were continued until December 31, 1975 (Exhibit C) and by order dated September 9, 1975 Petitioner's services were continued until June 13, 1977 (Exhibit D). By letter dated February 24, 1977 (Exhibit E) Petitioner was advised that the judges refuse to extend his services beyond June 13, 1977.

POINT I

RESPONDENTS' ACTION FROM INCEPTION VIOLATED EXISTING LAW.
IT WAS ARBITRARY AND CAPRICIOUS.

By notice dated June 23, 1975 (Exhibit B) all court personnel were notified as follows:

"You are advised that at its meeting of June 16, 1975, the Judges of this Court adopted a resolution by unanimous vote stating that it is the policy of this Court that appointees and employees of the Court retire from service upon reaching 70 years of age."

The respondents did not have the right to adopt such a resolution nor the authority to enforce it. Congress had preempted the area by enactment of the Civil Service Retirement Act, 5 U. S. C. 8335 which provides in part:

"(a) Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from service".

"(d) The automatic separation provisions of this section do not apply to --

(4) an employee in the judicial branch appointed to hold office for a definite term of years".

Petitioner does not have 15 years' Federal service and he was appointed "in the judicial branch . . . to hold office for a definite term of years".

Notwithstanding the foregoing, the respondents' order of June 16, 1975 (Exhibit C) gave as the reason for attempting to terminate the petitioner before the expiration of his eight year term the following:

"The policy of this court is that the best interest in the administration of justice is served by retirement of all supporting personnel of the court at age 70 . . .

and the court not previously having publicly announced the retirement policy above enunciated . . . "

Thus in attempting to terminate petitioner's service before the end of his term, the respondents' invoke a resolution which they had no right to adopt and no authority to enforce. 5 U. S. C. 8335 governs retirement of Court personnel and not the resolution of the judges of the Eastern District of New York.

28 U. S. C. 634(c) expressly extends to Magistrates the protection of the Civil Service Retirement Law (Chapter 83 Subsection III of Title 5) for it says in part:

"All United States magistrates, effective upon their taking the oath or affirmation of office, and all necessary clerical and secretarial assistants employed in the offices of full-time United States magistrates shall be deemed to be officers and employees in the judicial branch of the United States Government within the meaning of subsection III (relating to civil service retirement) of chapter 83 . . ."

Thus respondents' action in attempting to terminate petitioner before the expiration of his term was arbitrary and capricious as will be demonstrated more fully later herein.

POINT II

RESPONDENTS MISCONSTRUE THE FEDERAL MAGISTRATES ACT

In their order of June 16, 1975 (Exhibit C), the respondents recite

'Magistrate Vincent A. Catoggio's term expired under the provisions of 28 U. S. C. 631(d) as of the

close of the business day on Friday, June 13, 1975, by reason of his having attained the age of 70 years".

Nowhere does the Federal Magistrates Act 28 U. S. C. 631 so provide. If petitioner's term expired when he reached 70, then the judges would have been required under 631(e), to appoint him to another full eight year term if they were to continue him in service. This they obviously did not do. (Exhibits C & D).

28 U. S. C. 631(d) provides:

"(d) No individual may serve under this chapter after having attained the age of seventy years: Provided, however, That upon the unanimous vote of all the judges of the appointing court or courts, a magistrate who has attained the age of seventy years may continue to serve and may be reappointed under this chapter".

This subdivision as initially contained in S 945* and HR 5502*, stopped at the end of the first sentence so that no magistrate could serve after age 70. However Senator Tydings, as Chairman of the Senate Judiciary Committee, recommended relaxing this rule and suggested that the words "Provided however" and all that follows be included in the bill. (See report of Hearings before Sub Committee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate dated May 25, 1967 and compare Senate Report No. 371 of the Committee on the Judiciary dated June 28, 1967 in which the present wording of 631(d) was born). Both the House and the Senate agreed and there thereby was spawned a creature than which there can be no legislation more vague and indefinite and none which invites more arbitrary and capricious action coupled with unfairness and injustice. Termination at age 70 is not mandatory and applicable to all alike but whether a magistrate who reaches age 70 is permitted to continue to serve is a game of chance.

Further analysis of Subdivision 631(d) reveals the following:

1. It contains no guidelines, the use of which in terminating a magistrate before expiration of his term, are mandated. It completely leaves to the whim and caprice of the judges, determination of whether to terminate a magistrate before the end of his term or continue him in service after he reaches seventy. The subdivision has been diluted to the extent that mandatory retirement at age 70 completely has disappeared but no criteria are given which judges must follow in voting to continue or refusing to continue the services of a seventy year old and they are left free to be as arbitrary as they wish.

* 90th Congress

2. The moment the Judges voted unanimously to give the petitioner any extension, that extension had to be for the balance of petitioner's unexpired term. Use together of the words "may continue to serve and may be reappointed" leaves no room for doubt that the continuance must be only for the full balance of the unexpired term. How else could a magistrate be reappointed than by finishing his term. Nowhere in the subdivision does the language provide for extending a 70 year old Magistrate for 6 months as in the order of June 16, 1975 (Exhibit C) or for 18 months more as in the order of September 9, 1975 (Exhibit D).

3. Nowhere in 631(d) does it indicate the time when "the unanimous vote of all of the judges of the appointing court" must be obtained in order to continue a 70 year old Magistrate in service. It does not say that the unanimous vote must be had on the day before or the week before the Magistrate reaches 70. It merely says that at some time the unanimous court must agree that a magistrate should serve after his 70th birthday. Petitioner was appointed by unanimous order of all of the active judges of the court dated December 28, 1970 (Exhibit A) for a term of eight years which all of the judges knew full well would span petitioner's 70th birthday.* This order was a full compliance with the "unanimous vote" for continuance which is required in the subdivision.

The respondents would have us believe that 631(d) with all of its weaknesses, flaws, vagueness and unconstitutionality (as we will later demonstrate) must prevail over other clear and unmistakable mandates of the law, some of them right within section 631. Subdivision (e) of 631 provides:

* Petition page 3

"The appointment of any individual as a full time magistrate shall be for a term of eight years".

No attempt is made in the statute to clarify the obvious inconsistency between subdivision (d) and (e) if respondents' interpretation of subdivision (d) is to be followed. 631(h) provides:

"Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty or physical or mental disability . . ." (emphasis added)

Again there is no attempt in the statute to explain or cure the obvious inconsistency between subdivisions (d) and (h) of Section 631 if respondents' interpretation of subdivision (d) is to be followed.

The conclusion is inescapable that the framers of 631(d) never gave any thought to the question and never for a moment intended to provide that a magistrate should be terminated before completion of the first eight years of his service. The legislative history of the Act clearly demonstrates that Congress wanted to attract lawyers of ability and experience and to do so it guaranteed to them an eight year term. Cutting off a magistrate before he completes his first eight year term is directly contrary to the intention of Congress.

Senate report No. 371 (supra) says at page 8

"It (the bill) gives full time
U. S. Magistrates a secure 8-year term
of office" (emphasis added).

Senate report No. 371 further states at page 16

"Under 28 U. S. C. 631(e) as proposed by the
act, full-time magistrates are to be appointed
for 8-year terms, and part-time magistrates for
4-year terms. Your committee believes that these
terms of office, together with the provision of
the act that magistrates can be removed only for
cause (proposed 28 U. S. C. 631(h)), will afford a
good measure of job security to the appointee.
Many individuals, confronted by proposed section
632, which requires part-time magistrates to
refrain from criminal practice before the courts
of the United States and full-time magistrates to
give up the private practice of the law entirely,
might be reluctant to accept appointments as
U. S. magistrates without some assurance that
their appointments would last a reasonable time
and be protected against arbitrary terminations.
Your committee believes that the term and tenure
provisions of the act will both assure judicial
independence and facilitate the appointment of the
most qualified individuals. (emphasis added).

POINT III631(d) AND THE METHOD IN WHICH IT IS
EMPLOYED IN THIS CASE VIOLATE THE FIFTH
AMENDMENT.

If petitioner were a state employee and 631(d) were a state statute, the Fourteenth Amendment's due process and equal protection of the laws provisions, would knock out 631(d) and its application herein most quickly. We recognize that the Fourteenth Amendment does not protect a Federal employee as regards a Federal Statute. We also recognize that the due process and equal protection of the laws provisions of the Fourteenth Amendment are not synonymous with the due process provision of the Fifth Amendment. But as the late Chief Justice Warren said in Bolling v. Sharpe, 347 U. S. 497 at 499:

"The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of

prohibited unfairness than "due process of law", and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violation of due process".

631(d) and the method in which it is being employed herein, clearly are not fair and just in the light of the facts presented herein. In the Southern District of New York Magistrate Martin Jacobs petitioner's classmate who is somewhat older, is continued until April 1979 but the petitioner is to be terminated on June 13, 1977 his seventy second birthday. The action of either or both courts could be based on their liking or not liking the way the Magistrate parts his hair. Neither decision is required to be based on rational grounds. In 631(d) "provision is completely lacking in . . . terms susceptible of objective measurement". Crampt v. Board of Public Instruction of Orange County, 368 U. S. 279, 286. In that case the court continued.

"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential meaning of due process of law".

See also Conolly v. General Construction Co.
269 U. S. 385, 391

Indicative of the type of legislation which is forbidden by the Constitution is that found in Washington ex rel Seattle v. Roberge, 278 U. S. 116 49 S. Ct. 50. A zoning ordinance allowed an old age or children's home to be built in a 1st residence district on consent of the owners of property within 400 feet. The court in striking down the statute said at page 121:

"They are not bound by any official duty but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee (plaintiff) to their will or caprice".

In Saxton v. Barry, 233 F. 2d 220 Cert den. 352 U. S. 870 the Sixth Circuit said at p. 220.

"Due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government

unrestrained by the established principles of private right and distributive justice".

Again in Giaccio v. Pennsylvania, 382 U. S. 399 at 403 the court said:

"Implicit in this constitutional safeguard (due process) is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce".

Arbitrary discrimination in a Federal Statute is a denial of due process under the Fifth Amendment. Wallace v. Currin, 92 F.(2), 856 306 U. S. 1, 59 S. Ct. 378.

The Federal Government may not consistently with "due process" under the 5th Amendment do what a state is forbidden to do. Earnest v. Willingham, CA Kan. 1969, 406 F. 2d 681.

Federal Employees are protected by the Constitution. United Public Workers v. Mitchell, 330 U. S. 75 at 100, 67 S. Ct. 556.

"Due process" under the Fifth Amendment means fundamental fairness and it prohibits Congress from enactments which shock the sense of fair play. Radio Position Finding Corp. v. Bendix, 205 F. Supp. 850 at 856, aff'd per curiam 371 U. S. 577.

Subdivision 631(d) and the manner in which it has been utilized by the respondents in terminating petitioner's services, lack any semblance of fairness and for this reason as well as the vagueness and absence of guiding criteria, the subdivision and respondents' use of it, should be declared to be violative of the due process clause of the Fifth Amendment.

POINT IV

THE INJUSTICE TO PETITIONER

When petitioner took the position of Magistrate on January 1, 1971 he was compelled to give up his law practice^{*1} which had netted him substantially more than the \$22,500^{*2} annual salary. As Senator Tydings had predicted, the security of an eight year term was an inducement to petitioner as were the accompanying pension rights since petitioner had four years' prior government service.^{*3} In reliance on the security of an eight year term petitioner completely reshaped his life as well as his plans for the future when he was sworn in. Unpredicted but steadily mounting inflation put a terrible strain on petitioner's resources to the extent that thoughts of resigning repeatedly recurred. The security of an eight year appointment without fear of an earlier arbitrary termination stayed petitioner's hand.^{*4}

Suddenly and without any prior warning, the respondents conceived the idea that all 70 year olds were unwanted and with this, all of the petitioner's carefully laid plans crashed to earth.

*1 - Section 632

*2 - Petition page 6

*3 - Petition page 6

*4 - Petition page 6

If forced to retire in June 1977 petitioner will lose over \$3,000 a year in pension benefits plus his right to continue group life insurance of \$40,000 or more which the government now furnishes him.*1 12 years service is necessary in order to exercise this privilege (5 U. S. C. 8706) and petitioner will fall short by one year. Confident that he would serve out his eight year term and thereby be entitled to continue in force the group life insurance provided by the government, when he became a magistrate, petitioner cancelled other life insurance which he had carried for years.

This is the fate allotted to petitioner whose "substantial contribution . . . to the administration of justice . . . in the extraordinarily fine performance of his duties" is memorialized by court order and entered in its records. (Exhibit C).

*1 Petition page 7

POINT VPETITIONER DID NOT WAIVE OR GIVE UP ANY RIGHTS

Petitioner never consented to any order which by clear and explicit language amended the order of December 30, 1970 appointing him for an eight year term. At most he consented to an order which "continues the services" of petitioner. Petitioner persists in his contention that his so called "consent" did not waive any of his rights. (It is to be noted that respondents do not dispute petitioner's recitation of the circumstances and pressures under which the so called "consent" was obtained

When respondents argue that petitioner consented to termination of his services on June 13, 1977 and that therefore he is barred from any relief herein, they indulge in seeming ostrich-like logic and reason. Blinding themselves to the fact that it is their unlawful action iminitially which precipitated subsequent events, respondents attempt to avoid responsibility for their initial action by focussing attention on subsequent events. Respondents had no right to adopt a resolution requiring all court personnel to retire at age 70 (Exhibit B) and they lack authority to enforce the resolution. (5 U. S. C. 8335). Once this reality is recognized, any action or inaction on the part of the petitioner is of no consequence. Respondents had no right to say in their order of June 16, 1975 (Exhibit C) that their resolution to terminate the services of all 70 year olds was controlling. They gave and to date have given no other reason for their attempt to terminate petitioner.

Respondents would have us believe, that one who is bound to specific action by contract or otherwise, can be relieved of his obligation by taking illegal action and using controlling power and force and thereby cause the beneficiary to surrender his rights.

Respondents could not by unlawful action draw petitioner into consenting to shorten the term for which he was appointed. It is simple hornbook law that such coercion and duress is not permitted.

First National City Bank of Cincinnati v. Pepper

454 F2d 626, 632

Albert v. Harrison

68 F. Supp 732 cert. den. 331 US 810

Lonergan v. Buford

148 U. S. 581, 591

Radick v. Hutchins

95 U. S. 210, 213

Harmony v. Bingham

12 N. Y. 99, 117

Baldwin v. Liverpool

74 N. Y. 125

McPherson v. Cox

86 N. Y. 472

Respondents make the amazing statement that "even if his consent was induced by duress, he is estopped by his own conduct from challenging its validity" (brief p. 16). Thus they suggest, that they would have had petitioner walk out on them. For almost a year and a half the petitioner operated the Magistrate's Court practically single handed (Letter dated June 23, 1975 p. 12-13 respondents' Exhibit C). Again when Magistrate Schiffman retired effective April 30, 1976 he took terminal leave from March 22, 1976 and a new magistrate (there are only two) did not begin to function until May 22, 1976.* (A full field investigation of an appointee takes about two months). In effect respondents would penalize petitioner for not leaving the court without any Magistrate which is the very thing he loyally promised never to do. (Respondents' Exhibit C p. 14).

The Fifth Amendment protects petitioner's right to serve out his full eight year term. Respondents' may not jockey him or maneuver him out of these rights by unlawful action. A waiver of constitutional rights only may be obtained by clear and explicit action and language.

POINT VI

MANDAMUS AND PROHIBITION ARE APPROPRIATE REMEDIES

Judge Mishler's affidavit (p. 5) urges that the petition herein be considered on the merits. Granting that jurisdiction never can be foisted on the court by stipulation of parties to a controversy, it clearly appears that this court has jurisdiction over the instant controversy.

* Petitioner's Reply Affidavit p. 1

In Johnson v. Mishler, 526 F. 2d 364, (1975 CA 2) wherein a discharged probation clerk sought mandamus, this court speaking per curiam said "But we need not rely on the All Writs Act. We believe that jurisdiction is present in the exercise of our supervisory power over the administration of the courts. United States v. Dooling, 406 F. 2d 192, 198 (CA 2 1969). United States v. Weinstein, 452 F. 2d 704, 708-9 (CA 2 1971)."

In LaBuy v. Howes Leather Co., 352 U. S. 249, 259-60, 77 S. Ct. 309, 315 the Supreme Court approved the use by the Court of Appeals of Mandamus in exercising its supervisory power over the administration of the courts.

PETITIONER'S REPLY TO RESPONDENTS BRIEF

P 7 - No where and in no way did petitioner agree "that his term of office would terminate on that day" (June 13, 1977) - A waiver must be clear and explicit which the so called "consent" is not.

P 9 - Respondents wholly ignore those portions
and
12 of Senate Report 371 which demonstrate

1. Retirement at age 70 for a Magistrate is not mandatory under 631(d).
2. Congress wanted to insure against the arbitrary termination of Magistrates and subdivision (e) - eight year term and subdivision (h) - no removal except for cause, were expressly designed to do this.

P 11 - No where does 631(d) say that a
"contemporaneous determination of
fitness be made when the magistrate
reached his seventieth birthday."

P 14 - The reason "the Board of Judges
desired to work out a practical
resolution of the dispute" was
because they almost tragically burned
their bridges behind them and maneuvered
themselves into a difficult position from
which they had to extricate themselves.
(See reply affidavit). They came
perilously close to having no magistrates
at all.

P 15 - Respondents say "quite plainly, and it
is not disputed, here there was an
adequate remedy afforded by the courts."

By September 8, 1975 in no event
could an appeal have been taken from the
order of June 16, 1975 because of the 60
day rule F. R. C. P. 73.

Mandamus is a discretionary remedy
and a petition may be dismissed out of
hand. Federal Rules Appellate Procedure 21.

P 13 - The letters from and to the administrator's office regarding Magistrate Martin Jacobs who in May 1974 when he was 70, was continued until the end of his term in April 1979 when he will be 74 years and 11 months old demonstrate three things

1. Any extension must be for the unexpired term.
2. If no problem is presented under 631(d) in projecting an extension for a five year period, what is wrong with saying that petitioner's order of appointment must be construed as meaning that he was to serve a full eight years until he is 73? (Mishler's affidavit par. 2)
3. Justification is furnished for petitioner's fear, when he brought to Judge Mishler's attention the possibility of trouble by reason of 631(d) and petitioner's 70th birthday unless an order was entered directing that petitioner continue to serve. (Petitioner never doubted for a moment that an order extending his service for the balance of his term would be entered). The

letters demonstrate that the Administrator's office, acting as watchdog, and woodenly following the first sentence of 631(d) would have raised the question if petitioner had not.

CONCLUSION

That petitioner will suffer irreparable injury unless he is granted relief must be apparent. His economic well being will be completely destroyed and his emotional suffering from being drummed out of a court in which petitioner has practiced for almost fifty years (he first tried a case before Judge Galston in 1930) will be incalculable should he be terminated before the end of his term.

Accordingly it is submitted, that mandamus is a fitting and proper remedy and an order should be granted holding Section 631(d) to be wholly ineffectual and directing the respondents to continue petitioner in service until December 31, 1978 and prohibiting the termination of his services as a full time Magistrate before that date except for cause as provided in 28 U. S. C. 631(h).

Respectfully submitted,

VINCENT A. CATOGGIO
United States Magistrate
Eastern District of New York

Dated: Brooklyn, New York
April 1977